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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 286

PETER DIFRONZO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 287

MEDO CALZAVARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 286, App. I, Pet. 287, App. A) is reported at 345 F. 2d 383.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1965. Petitions for rehearing were denied on May 27, 1965. The petitions for writs of certiorari were filed on June 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Both petitioners raise the common issue whether it was error for the trial court to permit the jury to go home for the night while they were in the midst of their deliberations.

In addition, the following issues are raised in No. 287:

2. Whether the indictment should have been dismissed as to petitioner Calzavara.

3. Whether petitioner Calzavara's motion to suppress certain evidence was properly overruled.

4. Whether the trial court abused its discretion in refusing to permit petitioner Calzavara to testify concerning alleged threatening statements made to him by unidentified and unknown persons.

5. Whether petitioner Calzavara's testimony at a prior grand jury hearing was properly used in cross examination to impeach him.

In No. 286, the following additional issue is raised.

6. Whether the evidence was sufficient to support the conviction of petitioner DiFronzo.

STATEMENT

Petitioners, together with co-defendant Anthony Daddino, were convicted by a jury in the United States District Court for the Northern District of

Illinois on both counts of a two-count indictment charging knowing transportation of stolen goods in interstate commerce and conspiracy in violation of 18 U.S.C. 2314 and 317 (J.A. 1–2).[1] Each petitioner was sentenced to imprisonment for ten years on the substantive count and five years on the conspiracy count, to run concurrently (J.A. 10). The court of appeals affirmed the convictions, one judge dissenting as to petitioner DiFronzo on the ground that the evidence was insufficient to support his conviction (Pet. 287, App. A).

The evidence may be summarized as follows:

On April 29, 1961, three unidentified men robbed a Certified Grocery warehouse in Forest View, Illinois, taking large quantities of various types of merchandise valued at $161,716.00 (J.A. 14, 41–42). Shortly after the robbery, agents of the F.B.I. had petitioner Calzavara's farm near Grayslake, Illinois, under surveillance. During the early morning hours of April 30, 1961, two large tractor-trailer units and a 1961 Pontiac arrived at the farm (J.A. 14–15, 44–47, 53–54). About 8:00 p.m. on May 1, 1961, petitioner DiFronzo took the 1961 Pontiac to a rendezvous with a tractor-trailer unit rented earlier that day by co-defendant Daddino in Chicago and followed it back to the Calzavara farm (J.A. 15, 19, 32–33, 36, 38). About 11:53 p.m. co-defendant Daddino departed from the Calzavara farm driving a

[1] The jury failed to agree on a verdict as to co-defendant John Torello and the court granted his motion for a judgment of acquittal (J.A. 10).

tractor-trailer unit containing about $70,000 worth of stolen merchandise and proceeded into Wisconsin (J.A. 19–21, 30–32, 33–36, 41–42).[2] Twenty minutes after the truck left, three men left the farm in the 1961 Pontiac proceeding in the same direction as the truck (J.A. 16, 36). Just south of Union Grove, Wisconsin, the 1961 Pontiac passed the F.B.I. vehicle and moved in behind the truck, followed for a while and then passed at a high rate of speed (J.A. 20, 30). A short time later, the tractor-trailer was abandoned at a truck stop in Wisconsin and Daddino hitch-hiked back to Chicago (J.A. 30–32).

Some time after 2:00 a.m., May 2, 1961, petitioner Calzavara received a telephone call. Thereafter, he transferred stolen merchandise worth about $14,000 to the farm of his brother, Oscar Calzavara (J.A. 17, 40–41, 55).

The 1961 Pontiac returned some time before 5:19 a.m. It was occupied by three men, one of whom got out and departed in the remaining truck (J.A. 17, 55). F.B.I. agents followed the truck to Stone Park, Illinois and arrested petitioner DiFronzo as he abandoned it and ran (J.A. 18, 34–35, 37, 39). The truck contained $70,000 worth of stolen merchandise (J.A. 41–42).

ARGUMENT

1. Both petitioners complain that it was reversible error for the trial court, over defense counsel's objection, to permit the jury to return to their homes

[2] The trailer was being pulled by a tractor owned by petitioner Calzavara (J.A. 19–20, 30, 35–36, 54). Calzavara reported the tractor stolen on May 2, 1961 (J.A. 39–40).

for the night, citing *United States* v. *D'Antonio*, 342 F. 2d 667 (C.A. 7) (Pet. 286, pp. 14–17; Pet. 287, pp. 19–21). The record shows that the case progressed to the point of submission to the jury late on a Friday afternoon. At about 6:00 p.m. the trial judge had a conference with counsel to settle the procedure for obtaining the verdict. (The judge had a private engagement until late that evening and was to be out of town all day Saturday and Sunday). At this conference, it was agreed that the jury would deliberate until 10:30 p.m. that evening, at which time the court would reconvene to open sealed verdicts if agreement had been reached as to all four defendants in the interim (Gov't Supp. Br. App. 1a–5a). In the event the jury could not agree as to all defendants by that time, the court proposed to "instruct [the jury] as to their duties and let them return to their homes to resume their deliberations" the next morning (Gov't Supp. Br. App. 2a).[3] During this discussion, the following exchange took place between Mr. Callaghan, trial counsel for petitioner DiFronzo, and the court (Gov't Supp. Br. App. 5a):

> Mr. CALLAGHAN. I would have no objection, if your Honor please, if your Honor came back at ten-thirty, ten-forty, whatever the hour

[3] Subject to approval of counsel when court reconvened that night (Gov't Supp. Br. App. 3a), it was proposed that verdicts reached on Saturday would be sealed and opened Monday morning. Counsel agreed to waive polling of the jury so that it could be discharged upon termination of its deliberations (Gov't Supp. Br. App. 4a, 11a).

might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but I would have an objection to the jury separating.

The COURT. This is standard practice, Mr. Callaghan, and I am going to do it. The only cases in which we now lock up the jury are cases in which we have reason to believe that between ten-thirty or eleven o'clock at night when they are going to leave here and nine-thirty the next morning something may happen to interfere with the purity of their deliberations. I see nothing in this case which would lead me to believe that anybody is going to tamper with this jury on either side between the late hour that they will get out of here, assuming that they don't arrive at a verdict tonight, and the early hour tomorrow at which time they resume their deliberations.

Thereafter the court recessed to reconvene at 11:05 p.m. to assess the situation in light of the jury's evening deliberations. Upon reconvening, the court outlined the procedure proposed as follows (Gov't Supp. Br. App. 6a–7a):

The COURT. Gentlemen, it is my intention to ask the jury to join us and to make the following inquiries of the foreman:

First, to inquire as to whether or not the jury has arrived at verdicts with respect to any of the defendants; and thereafter, to ascertain, depending on what their answer is, whether they believe that they are reasonably close to verdicts with respect to any or all of the defendants.

If he advises me that they are not, I will then admonish them with respect to their conduct and excuse them until nine-thirty tomorrow morning. If he advises me that they are, I will inquire whether, in his opinion, they may be able to reach a verdict within the next 30 minutes, in which event I will permit them to resume their deliberations for that period of time, Then if they have not reached a verdict, we will excuse them until tomorrow morning—make it ten o'clock instead of nine-thirty, so the length of time will be the same. Is there any objection to that procedure?

Mr. CALLAGHAN. May I have one moment?

The COURT. Surely.

Mr. CALLAGHAN. Well, I don't need a conference as to part of the Court's suggestion. I object to any suggestion that the Court might make as to whether or not they might reach a verdict in 30 minutes, lest some juror capitulate on the basis that if we reach a verdict within 30 minutes, we will be permitted to go home.

The COURT. Then I won't ask them with respect to 30 minutes, but I will follow the same procedure. I will let them deliberate another 30 minutes, and if they have not reached a verdict then—this is assuming that they tell me that they believe they are reasonably close to a verdict.

Mr. CALLAGHAN. I think it would be a bad idea to state a certain time.

The COURT. All right. I am not sure that it presents any problem, but if you think it presents any problem, I will bend over backwards to obviate it.

When the jury was brought in, the foreman informed the court that, although they had agreed on verdicts as to some of the defendants, he did not believe they could agree as to the others that night. The court then instructed the jurors concerning their conduct overnight and separated them to their homes without further objection by defense counsel (Gov't Supp. Br. App. 9a–11a). After the jury had retired, the court confirmed counsel's agreement to waiving the polling of the jury and receipt of sealed verdicts to be opened on Monday morning (Gov't Supp. Br. App. 11a).

Since petitioner Calzavara raised no objection to the separation of the jury and agreed with the procedure proposed by the court,[4] he has no standing to complain now. Counsel for petitioner DiFronzo did object to separation of the jury at the early evening session and the record does not show that this objection was expressly withdrawn. We believe implied agreement can reasonably be inferred from the final Friday night session in which the court again outlined the procedure it intended to follow and expressly solicited objections thereto (Gov't Supp. Br. App. 6a). Mr. Callaghan objected to part of the procedure but did not renew his objection to separation of the jury. Nor was the objection renewed when the court instructed the jury and permitted them to proceed to

[4] The objection noted was registered by Mr. Callaghan, trial counsel for petitioner DiFronzo. Mr. Callaghan now represents petitioner Calzavara on appeal. We find nothing in the record suggesting that objection by one counsel would be treated as objection by all in informal conference with the court outside the presence of the jury.

their homes for the night. Further indication that counsel did not consider the point important is the fact that the issue was raised belatedly by supplemental brief in the court of appeals only after the Seventh Circuit decision in *United States* v. *D'Antonio*, 342 F. 2d 667. Petitioners have never suggested that they suffered any prejudice by the separation.

In these circumstances, even assuming (contrary to the finding below) that there was no agreement to jury separation, we believe that petitioners' reliance on *D'Antonio* is unwarranted. We read *D'Antonio* as resulting from a combination of circumstances not present in the instant case. There, in addition to objection to jury separation, the trial court failed to give a cautionary instruction[5] and improperly permitted off-the-record communications between the United States Marshal and the jury. Objections were promptly pursued on appeal. In the instant case, however, no improper contacts were made with the jury and the court gave a lengthy cautionary instruction and received the jury's affirmative assurances that they would keep their confidences (Gov't Supp. Br. App. 9a–10a).

Putting the *D'Antonio* decision to one side, it has long been the federal rule that separation of the jury is within the sound discretion of the trial court and

[5] Failure to caution the jury prior to separation has been held to be in itself sufficient for reversal. See, *e.g.*, *Coppedge* v. *United States*, 272 F. 2d 504 (C.A.D.C.), certiorari denied, 368 U.S. 855.

that review will not be accorded unless prejudice affirmatively appears. See, *e.g.*, *Holt* v. *United States*, 218 U.S. 245; *Wheeler* v. *United States*, 165 F. 2d 225, 229 (C.A.D.C.), certiorari denied, 333 U.S. 829; *Kleven* v. *United States*, 240 F. 2d 270, 273 n. 1 (C.A. 8); *Brown* v. *United States*, 99 F. 2d 131 (C.A.D.C.), certiorari denied, 305 U.S. 562; *Lucas* v. *United States*, 275 Fed. 405, 407 (C.A. 8), certiorari denied, 258 U.S. 620. The fact that *D'Antonio* went to such lengths to distinguish many of these cases suggests the importance of the peculiar fact situation to that decision. Whether or not *D'Antonio* was correctly decided, there is no occasion for this Court to review the holding of the Seventh Circuit in the instant case; on its facts, it is fully in accord with settled law.

2. Petitioner Calzavara contends that his prior testimony at a grand jury investigation should result in dismissal of the present indictment returned by another grand jury. He also claims that it should have precluded use of certain evidence at trial. At a hearing on a motion to suppress, it was shown that he appeared, pursuant to a grand jury subpoena, before the Grand Jury of the United States District Court at Milwaukee, Wisconsin on May 16, 1961 without having been warned of his constitutional rights (J.A. 23). Shortly thereafter, he was interviewed by F.B.I. agents who told him that he did not have to say anything, that he was entitled to an attorney and that whatever he said could be used against him in court (J.A. 25). The agents specifically told him that "we couldn't promise him any-

thing" (J.A. 26). At this interview, petitioner told the agents he had transported about $12,000 worth of the stolen merchandise to his brother's farm (J.A. 24–27). Thereafter, the Wisconsin grand jury returned an indictment charging petitioner with interstate transportation of stolen goods and conspiracy. That indictment was dismissed because it was returned by a grand jury before which petitioner had testified without being advised of his right to have counsel and to remain silent. *United States* v. *DiGrazia*, 213 F. Supp. 232 (N.D. Ill.) (Pet. No. 287, App. C., p. 10). The court there, while noting that petitioner had made "no direct incriminating statement" of fact, stated that it could not know whether "in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury" and accordingly gave petitioner the benefit of the doubt. (213 F. Supp. at p. 234; Pet. 287, App. C, pp. 13–14). Subsequently, the present indictment charging petitioner with the same offenses was returned by a Grand Jury for the Northern District of Illinois without benefit of petitioner's appearance.

a. Petitioner's assertion that the present indictment should have been dismissed (Pet. 287, pp. 13–17) is without merit. He did not testify before the second grand jury and it is conceded that he does not know whether his prior testimony was used in any manner before the subsequent Illinois grand jury.* The in-

*We have been informed by the United States Attorney's Office that only FBI agent testimony was presented to the second grand jury.

stant case clearly falls within the established rule that mere suspicion that illegally obtained evidence was presented to the grand jury is insufficient to prevent a trial on the merits. *Lawn* v. *United States*, 355 U.S. 339, 348–349.

b. Petitioner Calzavara also contends that the stolen merchandise recovered as a result of the FBI interview with petitioner shortly after his Wisconsin grand jury appearance should have been suppressed because it was a product of his compelled appearance and a governmental promise of leniency (Pet. 287, pp. 16–17). The trial court, after the hearing (*supra*), properly declined to suppress the evidence, finding that it was obtained after petitioner's appearance and after he had been fully informed of his constitutional rights by the FBI agents. The asserted "promise of lenity" as a ground for suppression was raised for the first time on appeal and properly rejected as coming too late (Pet. 287, App. A, pp. 6–7). In addition, it affirmatively appears that petitioner was informed that the FBI agents could not promise him anything.

3. Petitioner Calzavara contends that he should have been permitted to testify to conversations with unidentified persons in support of his claim of coercion (Pet. 287, pp. 18–19). The trial judge was confronted with this problem for the first time when petitioner attempted to testify about the contents of a telephone call he received prior to the movement of the stolen goods onto his property (J.A. 44). Objection was sustained when questioning showed petitioner did not

know the identity of the calling party. The issue came up again later when petitioner tried to testify to conversations with the unidentified drivers of the trucks who first brought the stolen goods to the farm and objection was sustained (J.A. 45). Finally, the court refused to permit testimony about conversations with unidentified men who arrived at the farm in a Pontiac automobile shortly after the stolen goods arrived (J.A. 45–46); however, at this point the question was reserved for further consideration at the next session of court (J.A. 46). At the next session of court, petitioner made an offer of proof to the effect that on the morning following the robbery five men came to his farm in a Pontiac and told him "if he did not do as he was told * * * that he had better learn to swim with cement boots on" (J.A. 47); that one of the men, who said his name was Brownie, shook a gun at him and told him that "as long as he was a good boy and behaved nothing would happen to him" (J.A. 47–48); and that he was "to keep his mouth shut, because they knew where his child went to school" (J.A. 48). These threats were allegedly repeated several times over the three day period after the stolen goods were brought to petitioner's farm (J.A. 47–48). Petitioner stated he could not identify the men who threatened him and had not identified them in the past (J.A. 49–52). The government, on cross-examination of petitioner on his offer of proof, brought out without objection that he had identified co-defendant Daddino before the first grand jury (J.A. 50–52). The trial court

excluded the offer of proof, stating in part that (summarized at J.A. 52):

> The laws of evidence require some basis for corroboration of conversations. That is the reason for the Dead Man's Statute, we don't permit people to talk about conversations with dead men, because the dead man isn't available to confirm or deny the conversation that was made.
>
> Similarly, we don't permit telephone conversations to be testified to, unless there is an identification, and a reasonable identification, of the person on the other end.
>
> Certainly we don't permit face-to-face conversations to be testified to when the witness insists he hasn't any idea who the person with whom he was speaking was or is, and cannot possibly identify, has no suggestion as to who the other party to the conversation was. If we did that, we would permit self-serving conversations to be received under all circumstances.

a. Contrary to petitioner's contention that the alleged threats were erroneously excluded on the ground that they were "self-serving" (Pet. 287, p. 18), the express ground for exclusion was petitioner's failure to identify the speakers. In the circumstances presented, we believe exclusion on that ground was within the discretion of the trial court. The men involved in the trans-shipment of the stolen goods were present on petitioner's farm for a period of about three days. His contacts with them included face-to-face confrontation and telephone conversations (J.A. 15, 44–56). Petitioner had an unusually long opportunity to ob-

serve the men who allegedly threatened him, yet steadfastly maintained he could not provide any clue as to their identity.[7] Apparently the court considered petitioner's professed inability to give any identification whatever tantamount to a deliberate refusal to testify as to highly relevant matters which he was bound to know, for the deliberate purpose of precluding meaningful cross-examination. Cf., *Brown* v. *United States,* 356 U.S. 148.

Moreover, petitioner's own testimony established the absence of at least one of the essential elements necessary to constitute a defense of compulsion, namely, a present, immediate, impending and continuing danger with no reasonable opportunity to escape the compulsion without committing the crime. *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F. 2d 338 (C.A. 9), certiorari denied, 343 U.S. 935; *R. I. Recreation Center* v. *Aetna Casualty & Surety Co.,* 177 F. 2d 603 (C.A. 1);

[7] Petitioner also testified that he did not see any of the seven individuals who came to his farm in the courtroom (his co-defendants on trial were Torello, Daddino and DiFronzo). He said they could be the same men, but he did not remember them as being the same (J.A. 49). He denied having previously identified pictures of "Brownie" or any of the other men (J.A. 49). An F.B.I. agent later testified, as part of government rebuttal, that he had interviewed petitioner on May 12, 1961, and petitioner had said one of the men in the Pontiac was 35 to 38 years old, 5′8″ to 5′10″ tall, with brown curly hair and pleasant features; that another man driving a tractor was a small Sicilian about 35 years old wearing a cap and brown trousers; and that another man was a tall dark man 30 to 35 years old wearing dark glasses, a hat, and carrying a transistor radio (J.A. 61). The descriptions apparently fit petitioner's three co-defendants (J.A. 62).

Shannon v. *United States*, 76 F. 2d 490, 493 (C.A. 10). Petitioner's own statements in the offer of proof show that he and his wife were free to come and go from the farm whenever they pleased and, at times, were left at the farm alone (J.A. 45–46, 48, 54–55). Where a matter as to which a defendant offers testimony does not constitute a legal defense, there can be no error in refusing to allow the offer. *Wigington* v. *United States*, 296 Fed. 125 (C.A. 4), certiorari denied, 264 U.S. 596. Here the court did not disallow all of petitioner's efforts to persuade the jury that he was acting under compulsion; it submitted petitioner's plea of compulsion to the jury under instructions to which no exception was taken (Calzavara Br. Supp. App. 1). The court drew the line only when it was persuaded that petitioner was attempting to achieve the benefit of relating alleged conversations with allegedly unknown persons without exposing himself to examination which would lead to their identification.

b. Petitioner Calzavara's further assertion that the government made erroneous use of his grand jury testimony at trial (Pet. 287, p. 15) is without merit. Use of the prior grand jury testimony (without objection in the district court) to impeach petitioner in a hearing outside the presence of the jury was proper. See *Walder* v. *United States*, 347 U.S. 62.

4. The statement of facts refutes petitioner DiFronzo's contention that the evidence was insufficient to support his conviction (Pet. No. 286, pp. 9–14). DiFronzo drove the 1961 Pontiac to a rendezvous with a truck rented in Chicago by co-defendant Dad-

dino and followed it back to the Calzavara farm. Three persons used this same automobile to follow a truck (which was driven by Daddino) carrying stolen merchandise into Wisconsin. This car returned to the farm the following morning with three persons in it. One of these persons got out of the car and drove the remaining truck with stolen merchandise aboard to an Illinois town and abandoned it. This person was identified as petitioner DiFronzo. The dissenting judge's observation that DiFronzo was in another truck transporting stolen goods from one point in Illinois to another place in the same State at the time the Pontiac was following the Wisconsin-bound truck rests on a mistaken view of the record. The majority of the court of appeals correctly viewed the evidence as warranting the conclusion that petitioner DiFronzo participated in both the substantive offenses and the conspiracy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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